United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2483

ORIGINAL

To be argued by
MANUEL TAXEL

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

- against -

ALLEYNE F. ROBINSON, JOSE ANTONIO ACOSTA ALVAREZ, a/k/a JOSE ANTONIO, a/k/a JOSE ACOSTA and JOSEPH M. VILLEGAS,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of New York

BRIEF FOR DEFENDANT-APPELLANT, JOSE ANTONIO ACOSTA ALVAREZ

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TABLE OF CASES

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74 Cr. 459

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BRIEF OF DEFENDANT-APPELLANT
JOSE ANTONIO ACOSTA ALVAREZ,
a/k/a JOSE ANTONIO, a/k/a
JOSE ACOSTA (hereinafter
ALVAREZ)

STATEMENT

The defendant ALVAREZ appeals from a judgment convicting him of three counts in the indictment, to wit, counts 1, 2 and 3. (913)*

Count 1 charges that from January 1, 1968 up to and including March 6, 1970, ALVAREZ together with the co-defendants ROBINSON and VILLEGAS conspired with other persons known and unknown to violate Title 29 U.S.C. § 501(c) and Title 18 U.S.C. § 2. That pursuant to the conspirancy defendants would willfully and knowingly, directly and indirectly embezzle, steal and convert to

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The numbers in parenthesis refer to the page of the testimony in the transcript of the trial.

their use "monies, funds, security, property and other assets of the National Maritime Union (hereinafter N.M.U.) to wit, ...Group 1 applications and classification document". Among the means whereby defendants would and did carry out the conspiracy was that the defendants "would and did receive money to falsely obtain Group 1 National Maritime Union classification documents for individuals who did not qualify as Group 1 National Maritime Union members."

Count 2 under overt acts, subdivision 1, charges that in or about May of 1969, he received approximately $750 from JUAN de DIOS BACHILLER and subdivision 2 that in or about April 1969 he received approximately $680 from HERNAN CANCELA.

THE STATUTES INVOLVED, 18 U.S.C. § 2; 18 U.S.C. § 371 and 29 U.S.C. § 501(c)

QUESTIONS PRESENTED

1. Does the indictment and did the evidence adduced at the trial against ALVAREZ constitute violations of the Federal Statutes so as to make him liable for the crimes for which he was found guilty?

2. Did the Government sustain its burden of proving the defendant ALVAREZ guilty of the offences charged in the indictment?

3. Was the indictment charging ALVAREZ with violation of Title 29 U.S.C. § 501 violative of his constitutional right of due process of law because the section is vague and uncertain as to the acts which defendant is charged to have committed which

allegedly violate the laws.

STATEMENT OF THE FACTS

The N.M.U., at all times relevant to these proceedings was a labor organization as defined in Title 29 U.S.C. § 402. During the period it furnished unlicensed seamen as crew members for the Military Sea Transportation Service (hereinafter M.S.T.S.) and other Governmental vessels and also to civilian owned vessels, pursuant to labor-management contracts (83). Its seamen members were assigned to the ships from its union or hiring hall at 36 Seventh Avenue in Manhattan by a shape-up system (84). Its contract with the civilian shipping companies required it to register all seamen seeking employment, whether union or non-union members and the union kept a file in its record room where information pertaining to sea time of all seamen within its area of jurisdiction was kept and where also the civilian companies paid welfare and pension benefits to the union even though a seaman was not a union member. In this connection and also for assignment to M.S.T.S. vessels the N.M.U. maintained a classification or grouping system, i.e., groups 1, 2, 3 and 4 (84). The purpose of these groupings was to establish a seniority system based upon the number of days each seaman served at sea within the jurisdiction of the N.M.U. At the time, when the alleged offenses occurred it was a prerequisite that a seaman had sailed at least 800 days on either M.S.T.S. vessels or commercial vessels or a combination of the two, and if such a seaman had that 800 days experience, he qualified for a Group 1 book in the union

which would give him top seniority and top priority in assignment to jobs on the further condition that he join the Union, pay an initiation fee of $150 plus $30 quarterly dues (92 - 94). Furthermore, only a book 1 member could take on a permanent assignment (103).

In order for the mariner to establish his 800 days for a book 1, he had to make application to the Union. In preparing his application he was required to submit his discharge certificates from civilian vessels which showed the number of days he had sailed on a particular vessel. With such discharges the N.M.U. was able to confirm the information by going to its files which showed the pension and welfare contributions made to the Union for the seaman even though he never held Union membership (95 - 96). However, with respect to M.S.T.S. and other Governmental vessels, the Union had no such records and it had to check the information furnished by the applicant at the M.S.T.S. office in Brooklyn. For the commercial experience the seaman filled out a white form and for the M.S.T.S. or military experience he filled out a green form (102). It was uncontroverted that these application forms were available throughout the Union Hall and anyone could pick them up regardless of whether he was qualified or not qualified for a Group 1 book and it was not necessary for the seaman to go to any specific person to obtain such a form (111 - 112).

Defendant ROBINSON had the title of patrolman and during the period in question, a patrolman was an elected official of the Union and among his responsibilities was to accept applications for

Group 1 membership. He would check with the M.S.T.S. office on the applicants' military sailing time; he would investigate seamen's grievances; meet with them aboard ship; collect their dues. The seaman would prepare his application forms with ROBINSON and it was his responsibility to take the M.S.T.S. papers to Brooklyn to check the information (121 - 125). After the forms were completed they would be sent to the union's record room where they were checked and verified to see to it that the initiation fee and dues receipted and they would prepare the Group 1 union book and a plate. It was also the duty of a patrolman and ROBINSON to collect the initiation fee of $150. (127 - 128). The patrolman had no control of the record room or of its records and all of the processing and records of the M.S.T.S. were under control of its office in Brooklyn (135 - 137).

ALVAREZ was a Master-at-Arms. He was stationed at the union hall door and his duties were similar to that of a bank guard, i.e., to keep order, to screen persons entering into the union hall and to direct them to their destination. (133 - 134).

JUAN de DIOS BACHILLER, called as a Government witness, testified that in early 1969 he was a Group 2 member of the union and that he knew ALVAREZ. In June of 1969 he met ALVAREZ at the union hall and spoke to him. ALVAREZ asked him how long he had been sailing and he said since 1967 (319). He said to ALVAREZ: ..."I had a small time needing to get the book." i.e., "for Group 1", and ALVAREZ told him that he could get him a book. The next day BACHILLER gave ALVAREZ $600. ALVAREZ then took him to ROBINSON's

office where he gave the latter his discharge papers and he signed forms in blank, that were given by ROBINSON (321 - 322). Since BACHILLER did not speak English he did not understand nor did he recall what was said between ROBINSON and ALVAREZ at that time. BACHILLER testified that at the time that he had about one month's sailing time on M.S.T.S. vessels but considerable time on commercial vessels. After signing the forms he gave ROBINSON $150 for his initiation fee and got a receipt (322 - 325). The following November he got his Group 1 book but in March 1970 the union took his book away from him. He then told ALVAREZ of that fact and also informed him that he had been to the F.B.I. ALVAREZ told him not to worry, the book would be returned (327 - 333).

Government witness HERNAN CANCELA identified ALVAREZ and stated that he first met him in April of 1969, when he approached ALVAREZ and talked to him about a union book, if he could get a union book I (454). ALVAREZ said that he could help him, "the only thing I needed to give $600 to get a book" (455). Two or three days later he went back to the union hall and spoke to ALVAREZ and told him that all he could raise was $500. (455). ALVAREZ took the money, entered the elevator, and then he came back and took CANCELA up to ROBINSON. ROBINSON gave him some blank forms to sign which he did (456 - 458). He gave Robinson $180 for which he got a receipt, and he got his Group 1 book in November 1969 (459). He could not remember it was in May or November of 1969 that he gave ROBINSON the $180 (460). In December 1969 the union took back his book (464).

Government witness WILFREDO GANDIA* testified that he met

*ALVAREZ is not specifically charged with any transaction involving the witness GANDIA.

ALVAREZ in the Fall of 1968 and that ALVAREZ told him that it would cost about $600 to get a Group 1 book (508). He came back a few weeks later and he met ALVAREZ who then took him up to meet ROBINSON. The money was given to ROBINSON (512) and he signed some papers at ROBINSON's desk. ROBINSON asked him for his discharge papers which he gave him. He did not recall whether there was any information on the form when he signed it (513). He obtained a receipt from ROBINSON for the sum of $190. According to this witness, he only had 90 days sea duty with no M.S.T.S. time. He never received a Group 1 classification (512 - 517).

The Government attorney admits that he did not have the signed applications of any of the witnesses (532 - 533). The Government rested at this point.

On the arguments on defendant's motion to dismiss, the U.S. attorney stated (537) that there is no evidence of embezzlement of union property on the part of ROBINSON but rather that the Government proceeded on "classic common law theory of conversion" and that ROBINSON misapplied the documents to his own use.

The following is the U.S. attorney's colloquy.

> "If your Honor will recall, the term conversion is expressly set out in 29 U.S. Code Section 501C under which this indictment was drawn. Conversion in the common law sense and as expressed by the section is the use or misuse or abuse, if only for a temporary time, of property which has been entrusted to one for a limited purpose, and the theory here of course is <u>that these applications and documents were entrusted to Mr. Robinson for the purpose of his assisting seamen in completing those applications and for the purpose of processing them along the line</u>. (Emphasis added).
>
> The theory of conversion comes in of course on the ground that he misapplied these documents to his own use."

Defendant ROBINSON testified that he was elected a patrolman in 1969 and that his duties included receiving applications for Groups 1 and 2 membership. He worked primarily with the M.S.T.S. people. His testimony on the procedure for the acquiring and the processing of Group 1 membership was substantially in accordance with the testimony of hte Government witnesses. Application forms are obtainable anywhere in the hiring hall. It was not necessary that he be approached for the forms. Many of the applicants already had these forms with them when he met with them (557). When an applicant for Group 1 with a background of M.S.T.S. experience approached him, he would make inquiry of his service on Governmental vessels and put the information of the form (557). On the other hand, commercial sailing experience was documented with discharge papers (558). The applications, i.e., M.S.T.S. forms, which he described as being blue, were then placed in an outgoing basket and kept there until a number of them were accummulated and then when someone went to Brooklyn, the y would be taken to the M.S.T.S. office wehre they were checked by the M.S.T.S. personnel and then returned to him to the office (563). Then the blue applications were combined with the whites and sent up to Mr. NESBITT's office. Mr. NESBITT was a national representative of the N.M.U., in charge of the pension and welfare fund. His department would check the applications, particularly the white ones against the records kept in the union's record room and either approved or disapproved based upon what their records showed (565 - 566) regarding the seaman's commercial experience (565 - 566). Then the record room would notify the various departments of those persons who

made up the Group 1 list and it is at that point that he took the initiation fee of $150 and the dues and another application was then prepared for the Group 1 book (567 - 569). It frequently happened that a seaman would be classified as Group 1 and be permitted to take on an assignment even though his book had not as yet been issued. ROBINSON categorically and unequivocally denied ever receiving any money from any persons other than for union dues and initiation fees. He always issued receipts for the money he received; that he never had access to any of the M.S.T.S. records, and that he never had any agreement or understanding with either ALVAREZ or VILLEGAS regarding accepting illicit monies (576). He was required each and every day to account for the monies he received and the receipts that he issued therefor and he further established, without contradiction, that he could not and did not issue receipts for monies he received on behalf of the union without promptly on the same day or at the latest the following day submit the monies and receipts to the union.

The Government conceded and stipulated that as far as the white forms were concerned, i.e., the commercial vessel applications, that the information submitted on these forms were accurate and correctly compared with the copies of the seaman's discharges and that insofar as these white forms were concerned there was no misrepresentation as to their accuracy (586).

ROBINSON also testified, without contradiction, that the applicant for Group 1 could not receive his book on the same day that he applied because of the investigatory routine required in the processing (587) and that it would take from two to as much as

five weeks before the record room of the union confirmed that the applicant was qualified for a Group 1 book (588). It was then only that he as a patrolman took the application for Group 1 book and at which time he received the initiation fee and the dues.

Thus it appears that the following was the procedure: First the seaman applying for Group 1 would fill out green or white application forms or both to establish his eligibility. After these forms were verified and accepted, he then prepared another form for his book and card (557 - 567, 588, 589).

On cross-examination, the Government's attorney laid great emphasis on the fact that a number of the M.S.T.S. applications had been reviewed and processed by a Mrs. MAYNARD at the M.S.T.S. office in Brooklyn (613, 616, 619, 620, 623), and though ROBINSON vehemently denied ever giving any money to Mrs. MAYNARD or that she had ever received any money from anyone else in connection with false verification (623, 624) the prosecutor nevertheless without any supportive evidence suggested to the jury that Mrs. MAYNARD was in fact involved with the defendants and particularly ROBINSON in a conspiracy to issue Group 1 books based upon false M.S.T.S. sea time (858, 860, 861, 862).

ROBINSON's only connection with ALVAREZ was knowing that he was a Master-at-Arms charged with maintaining order at the union hall (644) and if BACHILLER and CANCELA paid any monies to ALVAREZ he knew nothing of it (645). True that ALVAREZ came to his office on occasions (647). He also pointed out that there were always four to five other Masters-at-Arms available at all times (666).

ALVAREZ testified that he was a member of the N.M.U. since 1945, that he was a Master-at-Arms between June 5, 1969 and January 6, 1970, that his duties were like, that of a doorman, i.e., to examine the seamen's identifications, that it was not his duty to collect dues or collect money, nor was he an officer of the union (673), that he never received any monies from BACHILLER or CANCELA (673 - 674), that he has no recollection of ever bringing GANDIA to ROBINSON's office (674) and he never took any money from any seaman to help him obtain a Group 1 status with the union. He does not remember ever talking to CANCELA, never saw GANDIA before coming to Court (689, 690) that he did on occasion direct seamen to ROBINSON's office (685). He never heard of anyone buying a Group 1 book (681). In 1970, seamen did complain about losing their books but he never spoke to BACHILLER over the phone because his phone is a private listing (691 - 693).

The Government in rebuttal called BIENVENIDO BRACERO, who testified that he was a N.M.U. seaman between 1966 to 1969, that in 1968 he was in Group 2 (697 - 699) and that in 1968 he applied for Group 1 (698); he knows defendants ALVAREZ and ROBINSON, that he saw ALVAREZ in November of 1968 at the union hall and inquired about getting a Group 1 book. ALVAREZ said he did not know anything about it but that he would investigate. "This is new to me, but you know something that can get you into trouble, I don't -- I will see" (699). Two days later ALVAREZ told him that the only man that could do something is an agent or dispatcher and he went in and he met ROBINSON (700). ROBINSON told him it would cost $800, that he was

to bring $800 and his discharge papers which he did the following day (700 - 702). It is to be noted that the application that this witness signed at the time (Exhibit 32) required a seaman to have 400 days for admisssion to Group 1 (703 - 704). Thereafter he got his Group 1 book (705) which was taken away from him in early 1970 (706).

THE COURT'S CHARGE TO THE JURY

The Court stated that the defendants are charged with converting or misusing Group 1 documents, that ALVAREZ and VILLEGAS aided and abetted (876), that under § 501(a) officers, agents and other representatives of a labor organization (N.M.U.) occupy a position of trust in relation to such organization and its members as a group (877). It is therefore the duty of each such person to hold the organization's money and property solely for the benefit for the organization and its members and to refrain from holding or acquiring any pecuniary "(that means money)" or personal interest which conflicts with interest of such organization. That § 501(c) provides that any person who converts to his own use any of the property of a labor organization "(property here, of course, of these union forms) of which he is an officer or by which he is employed, directly or indirectly, is guilty of a crime." That the Government charges these defendants with having converted these Group 1 applications and classification documents by using them to sell classifications to unqualified seamen (878). The Court instructed the jury on the conspiracy count under Title 18, § 371 of the U.S.C. which provides that if two or more persons conspire to

commit an offence against the United States and any one or more of such persons does any act to further the objectives of the conspiracy, each member of the conspiracy is guilty under § 371 (879). The Court thereupon reviewed all of the counts of the indictment (880 - 887). The Court instructed (889) that it is sufficient that if the Government proved beyond a reasonable doubt that at least one of the 11 acts of the indictment was committed in furtherance of the conspiracy, a conspiracy has been established.

The Court also discussed "aiding and abetting" with respect to counts 2 through 5, and that it is the Government's contention that ALVAREZ and VILLEGAS aided and abetted ROBINSON by collecting the money for the books that were going to be issued by ROBINSON. The Court cited Title 18, § 2A which provided that whoever commits an offence against the United States, or aids, abets, counsels, induces or procures its commission is punishable as a principal. "All that means is that after you help somebody else commit a crime, you are also guilty of that crime" (894). The Court also instructed that for the jury to find that ALVAREZ was guilty of aiding and abetting that the Government had to prove beyond a reasonable doubt that ALVAREZ knew that the money he received was part of a venture to convert these union documents, to sell these documents to seamen who are not entitled to them." (894, 895).

Defendant ALVAREZ was found guilty of counts 1, 2 and 3 of the indictment (912) from which this appeal is taken.

POINT I

NEITHER THE INDICTMENT NOR THE EVIDENCE ADDUCED AT THE TRIAL ESTABLISHED THAT ALVAREZ OR ROBINSON VIOLATED A FEDERAL STATUTE. ACCORDINGLY, THE DISTRICT COURT HAD NO JURISDICTION AND THE INDICTMENT SHOULD HAVE BEEN DISMISSED.

The defendants are not charged with embezzling, stealing or converting any funds but rather a few application forms, to be used by seamen for applying for Group 1 membership. The District Court is a Court of limited jurisdiction, and has no jurisdiction over matters not conferred upon it by Statute, (Klein v. Burke Const. Co., 260 U.S. 226, 233, 234) and if Title 29 U.S.C. § 501(c) has no application to the present circumstances, notwithstanding that defendants or any one of them may have performed acts which elsewhere may be denominated as crimes or torts, then there was no jurisdiction for an accusation against such defendants under the act in question. In Gurton v. Arons, 399 F 2d 371 U.S. Ct. App. 2d Cir., the Court stated:

> "It is equally clear that Section 501 of the L.M.R.D.A. has no application to the present controversy. A simple reading of that section shows that it applies to fiduciary responsibility with respect to the money and property of the union and that it is not a catch-all provision under which union officials can be based on any ground of misconduct with which the plaintiffs choose to charge them. If further corroboration for this position be needed it will be found in the legislative history and in the law review articles cited by Judge Tenney in his opinion in the district court. 234 F. Supp. at 442-443."

Section 501(c) of Title 29 is but one subsection of Chapter 11 in the Title and which bears the caption LABOR-MANAGEMENT REPORTING AND DISCLOSURE PROCEEDING ACT. This title is referred to in Gurton v. Arons, supra as L.M.R.D.A.

Section 401 of Chapter 11 states the findings, purposes and policy of the legislation. Subdivision (a) declares the essentiality that "labor organizations, employers, and their officials adhere to the highest standards of responsibility and ethical conduct in administrating the affairs of their organizations, particularly as they affect labor-management relations." Subdivision (b) states that recent investigations in the labor-management field disclosed instances of breaches of trust, corruption and disregard of the rights of individuals, employees and other failures to observe high standards of responsibility and ethical conduct; and subdivision (c) declares that the enactment of the chapter is necessary to eliminate and prevent improper practices on the part of labor organizations, employers, labor relations consultants, and their officers and representatives which distort and defeat the policies of the Labor Management Relations Act and the Railway Labor Act, and which have a tendency of burdening or obstructing commerce by 1) impairing the efficiency or operations of commerce; 2) occurring in the current of commerce; 3) materially affecting, restraining or controlling the flow of materials of manufactured goods in commerce or the prices of such goods; and, 4) causing diminution of employment and wages in such volume as to disrupt the market of goods.

The Act is broken down into six additional subchapters, the titles of which generally describe each of their contents, i.e., in subchapter 2 is a bill of rights of union members. Subchapter 3 requires reporting by unions and their officers and by employers. Subchapter 4 creates the concept of trusteeship on the part of union

officials with respect to union funds and property. Subchapter 5 deals with election in unions. Subchapter 6 is entitled SAFEGUARDS FOR LABOR ORGANIZATIONS and § 501 is one of the sections appearing under this subchapter. Subchapter 7 deals with miscellaneous matter.

Section 501 (a) declares that officers, agents, shop stewards and other representatives of the union occupy positions of trust to the union and its members. They each hold the money and the property of the union "solely for the benefit of the organization and its members" and they are proscribed in their dealing with the union in any adverse manner and they are required to account to the union for any profit made on any union matter.

Subdivision (b) provides that when any such person violates his duty and if the union or its governing officials fail to sue to recover damages or for an accounting or other relief by reason of any violation of trust then any member of the union may sue in any District Court of the United States or any State Court to recover damages or to obtain an accounting.

Subdivision (c), and for which each of the defendants are charged with violating, makes it a crime to embezzle, steal or unlawfully and willfully abstract or convert monies, funds, securities, properties or other assets of a labor organization of which he is an officer or by which he is employed, etc.".

Patently, none of the defendants embez zled, stole or converted any monies, funds, securities of the union as provided in § 501. ALVAREZ, a Master-at-Arms, was a non-elected employee and

and his prime function was comparable to that of a guard or doorman. He could not be considered one of the persons declared by Chapter 11 or § 501 thereof to hold a position of trust. He is charged in two counts of the indictment of taking sums of money from various persons, presumably in order to obtain for them Group 1 membership. Assuming without conceding that ROBINSON, acting independently or with assistance of ALVAREZ did misuse the union's application forms, the fact is that neither of them embezzled, stole or converted any of the union's money. In truth and according to the evidence the union profited by their misdeed. The evidence is uncontroverted that each of the Government's witnesses paid to ROBINSON the sum of $150, and that some of them, in addition, gave him $30 for quarterly dues. It is not claimed that the union did not receive either the initiation fees or the dues for which each of the witnesses were issued official receipts. Neither was there any evidence that whenthe Government's witnesses were relieved of their Group 1 books, that the union refunded their initiation fees and their dues or any additional sum as compensatory damages for their being misled. In short, the union profited and therefore the union cannot claim that its property and funds were embezzled.

It is patent that the legislation was not designed to reach members of the union who did not occupy official positions of trust or was it intended to apply to intangible property of nominal value, i.e., a few blank forms that lay about throughout the union hall and was available to anyone regardless of whether

he required them or not. The legislation was not designed to reach misdeeds of defalcation, embezzlement or any other form of prima facie tort between one member and another. In Guarnaccia v. Kennin 234 F.Supp. 429, Mr. Justice Tenney of this Court stated (page 443):

> "More important, however, is the fact that plaintiffs have not cited, nor has the Court been able to find, a decision under Section 501 which involved an alleged breach of duty in respect to matters other than finances. Thus, for example, Holdeman v. Sheldon, 204 F.Supp. 890 (S.D.N.Y.) aff'd, 311 F.2d 2 (2d Cir. 1962) cited by plaintiffs, involved a suit arising out of the issuance of checks and expenditure of certain funds."

In 1959 U.S. Code, Congressional and Administrative News under S.R. 187 at page 2321 the proponents of the legislation stated the purpose of the bill (and referring to § 501 (a)) was to "provide criminal penalties for embezzlement, conversion of Union funds". Simultaneously the House of Representatives in its report on the bill H.R. 741 at page 2432 stated "Section 501(c) would create a new Federal crime of embezzlement of any funds of a labor organization".

The courts, being cognizant of congressional intent, have consistently held that Section 501(c) was designed to deal with the "taking" of Union funds.

> United States v. Silverman, 430 F.2d 106 2d Cir. p. 114. ("Section 501(c) is read as requiring an intent to deprive the Union of the use of funds and either a lack of Union benefit from the expenditure or a lack of proper authorization for the expenditure." (Emphasis added.)

United States v. Debrizze, 393 F.2d 642 (2d Cir) at p. 644. ("Before a violation of 29 U.S.C. 501(c) can be made out, it must be shown that the person charged with the violation has unlawfully and wilfully abstracted or converted to his own use or the use of another, the funds of the Union.") Emphasis added.

Colella v. United States, 360 F.2d 792 at p. 799. ("Section 501(c) establishes a new Federal crime of embezzlement of any funds of a labor organization.") Emphasis added.

Throughout the United States, jurisdictions have uniformly held that property cannot be converted unless it has "value". Pearson v. Dodd, 410 F.2d 701 (D.C. Cir. 1969), cert. denied 89 S. Ct. 2021; McClung v. Thompson 401 F.2d 253 (8th Cir., 1968); Dawkins v. National Liberty Life Insurance Co. 263 F.Supp. 119 (D.C. S.C. 1967); Metropolitan Life Insurance Company v. San Francisco Bank 136 P.2d 853 (Dist Ct. of Appeal, Cal. 1943); Bentley v. Mountain 51 Cal app. 2d 95, 124 P.2d 91; Gensinger v. New Illinois Athletic Club 339 Ill. 426, 171 N.E. 514; 89 C.J.S. 543 Trover and Conversion, section 33. *

While Federal Courts have had relatively few opportunities to discuss the value doctrine of the law of conversion, that principle of law was reaffirmed by the Court of Appeals for the District of Columbia in Pearson v. Dodd, Supra. In that case, the employees of Senator Thomas J. Dodd, at the instance of Washington columnist Drew Pearson, surreptitiously removed files from Dodd's office and delivered them to Pearson. Pearson photostated the con-

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* "Trover cannot be maintained for the conversion of any kind of property unless it is shown that it was of some value."

tents of the files and then returned them intact to the Senator's office. In reversing the District Court, the Court of Appeals in an opinion by Judge J. Skelly Wright, found that no conversion had taken place as the contents of the files had no value.

Embezzlement, being a form of conversion, jurisdictions across the country generally hold that property without "value" is incapable of being embezzled. 26 Am.Jur. 2d 12; Treatise on the Law of Crimes, sec. 12.20 at p. 905 (Clark and Marshal 7th ed. 1967); 2 Whartons Criminal Law and Procedure 227, Sec.536; United States v. Mott 1 McLean 499 at p.504 (7th cir. 1839); Chappell v. United States 270 F.2d 274 (9th cir. 1959); State v. Tauscher 360 P.2d 764 (Sup.Ct. Oreg., 1961); People v. Hayes 365 Ill. 318, 6N.E.2d 645; Hogaboom v. State 234 N.W. 422 (S.Ct. Neb. 1931).

The property allegedly "taken" in violation of section 501(c) to wit, National Maritime Union Group I application forms and classification documents, had no intrinsic value and could not be converted or embezzled. State v. Tauscher, Supra; People v. Hayes, Supra; Bentley v. Mountain, Supra. * Genslinger v. New Illinois Athletic Club, Supra. **

The applicability of the value doctrine is readily apparent with respect to the Group 1 application forms as they could be picked up free of charge at any N.M.U. union hall, where they

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* It was held that Union Beauty Shop Cards cound not be converted in the absence of some showing that the cards had any value.

** Club membership certificates not being transferable had no value and could not be converted.

lay strewn about. To contend that they were converted or embezzled is no less absurd than an assertion that an ineligible senior citizen who picked up a few medicare applications from a stack of forms piled up in the waiting room of a Social Security Administration Office, "converted" or "embezzled" said applications.

Similarly, the classification documents as chattels had no value and were incapable of being **converted** or embezzled. They were neither transferable nor negotiable and had no value on the open market. State v. Tauscher, Supra; People v. Hayes, Supra; Chappell v. United States, Supra. Moreover, the privileges which such documents may represent are intangibles which cannot be the subject of conversion or embezzlement. Chappel v. United States, Supra; * Dawkins v. National Liberty Life Insurance Co., Supra at P.121; ** People v. Hayes, Supra; McClung v. Thompson, Supra; Metropolitan Life Insurance Company v. San Francisco Bank et al., Supra.

The application of section 501(c) to the facts of this case extends Federal Jurisdiction to an area where it should not be and creates a dangerous precedent. A union employee or official could be prosecuted under the statute for taking home from union headquarters such trivial items as a box of rubberbands, a ream of paper, a few paper clips or some envelopes. One can readily see

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* That case held that labor and services were intangibles and could not be embezzled under 18 U.S.C.641 which forbade embezzlement of United States property.

** "Money may be the subject of conversion, but Trover will not lie to enforce a mere obligation to pay money." Dawkins v. National Liberty Life Insurance Co., Supra at P. 121.

the potential for prosecutorial abuse, especially where the particular union official is controversial or unpopular.

Since the defendants are not charged with unlawfully extorting money from seamen but rather for the illicit use of union application forms, a rather novel crime is advanced. The union does not claim that these applications had any intrinsic value and since the union did in fact derive substantial monetary profit by their use which it never returned, it cannot be claimed that the union therefore suffered a pecuniary loss or damage. There remains one other alternative and that is that the forms were used to enter false information on them. The real effect of such a concept would be to expose a person to criminal charges for putting erroneous information on to an application form however innocent his intention or motives may have been. The charge is not that the union was misled but rather incorrect use was made of a few sheets of papers. Is this what was intended by the Congress in enacting Chapter 11?

Nowhere in either the Senate or House of Representatives Reports, is there any intimation that the legislation, i.e., Chapter 11 and § 501 was intended to make it a crime under the chapter for one union member, not an official and not occupying a position of trust, to embezzle or defraud another member or non-member person. In fact, the U.S. attorney stated this position, which was restated by the Court, in its charge, that the crimes charged the defendants with the conversion or misuse of union documents (537, 842, 876). According to the statement of the prosecutor, the unlawful acts

consisted in the conversion of forms and their unlawful use by ROBINSON. There was no evidence that ALVAREZ procured the forms and made illicit use of them. All the evidence shows that it was either the seamen who brough t the forms to ROBINSON or it was ROBINSON who furnished the forms.

Counts 1 and 2, (counts 2 and 3 in the verdict) under Overt Acts, should have been dismissed against ALVAREZ because they charge him with unlawful taking of monies from BACHILLER and CANCELA.

POINT II
ALL COUNTS AGAINST ALVAREZ SHOULD HAVE BEEN DISMISSED FOR LACK OF EVIDENCE THAT HE CONVERTED UNION FORMS OR AIDED AND ABETTED IN THEIR CONVERSION

There was absolutely no evidence that ALVAREZ misappropriated the application forms or misused them. They were available throughout the union hall. Seamen were able to pick them up themselves; or if ALVAREZ used any, they were given to ROBINSON, who in the normal course of his regular functions, had the right and the duty to receive them. There was no evidence that ALVAREZ knew or could have been presumed to know that ROBINSON made unlawful use of them. It is also evident that there was no evidence to show that ROBINSON incorrectly filled out the forms. It appears from the evidence that the white applications were correctly filled out and that whatever misinformation was entered onto the green M.S.T.S. forms was obtained from thjat office. No evidence was adduced to conclusively show who it was at the M.S.T.S. office that furnished false information. The prosecutor and the Court permitted the jury to

speculate that it was Mrs. MAYNARD, but no evidence of that fact ever appeared. The jury should not have been permitted to make such a speculation because it was too tenuous. (U.S. v. Lynch, 366 F.2d 829 Cir. Ct. of App., 3rd Cir., page 830). The jury was permitted to guess that it was possible that Mrs. MAYNARD acted in collusion with ROBINSON in falsifying the green forms. Similarly, ALVAREZ was connected with ROBINSON, as both an aider and abettor and a co-conspirator on such tenuous assumptions and speculations. In Bacon v. U.S., (127 F.2d 985 Cir. Ct. of App., 10th Cir., page 987) the Court stated "Mere possibility or assumption that goods lawful in themselves might be used unlawfully is not enough to make one an aider and abettor"; and the Court vacated a conviction for conspiracy because "The record is devoid of any evidence which tends to show that Bacon had any conversation, agreement, dealings or understanding with Fox regarding an agreement to violate the liquor transportation act. (page 986).

ALVAREZ in count 1, subdivision 1 is charged with violating 18 U.S.C. § 2, i.e., as a principal in aiding and abetting ROBINSON and simultaneously is charged with conspiracy under 18 U.S.C. 371. These sections have no application because the acts charged do not involve an illegal act against the United States. (Jones v. United States, 365 F.2d 87 Cir. Ct. of App., 10th Cir., page 88).

There was no evidence that ALVAREZ aided or abetted ROBINSON in connection with any violation of § 501. If any other

law was violated the addition of an aiding and abetting accusation by itself does not constitute a crime since "There can be no conviction for aiding and abetting someone to do an innocent act." (U.S. v. Shuttlesworth 373 U.S. 262, 263). In U.S. v. Garguilo 310 F.2d 249 U.S. 2d Cir Ct. of App. Judge Friendly made the following observation on the charge of aiding and abetting (page 253):

> "...But knowledge that a crime is being committed, even when coupled with presence at the scene, is generally not enough to constitute aiding and abetting. In Nye & Nissen v. United States, 336 U.S. 613, 619, 69 S.Ct. 766, 93 L.Ed. 919 1949), the Supreme Court said, quoting Judge Learned Hand in United States v. Boni, 100 F.2d 401, 402 (2 Cir. 1938):
>
> "In order to aid and abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as insomething that he wishes to bring about, that he seek by his action to make it succeed.'"
>
> See also Morei v. United States, 127 F.2d 827, 831 (6 Cir.1942).
>
> "It is true, as the Government urges, that evidence of an act of relatively slight moment may warrant a jury's finding participation in a crime....It is true also that participation may be proved by circumstantial evidence, as in United States v. Lefkowitz, 284 F.2d 310, 315-316 (2 Cir.1960),...There may even be instances where the mere presence of a defendant at the scene of a crime he knows is being committed will permit a jury to be convinced beyond a reasonable doubt that the defendant sought 'by his action to make it succeed'--for example, the attendance of a 250-pound bruiser at a shakedown as a companion to the extortionist, or the maintenance at the scene of crime of someone useful as a lookout...Here, on every occasion that was the subject of testimony, Garguilo was the actor, often he was alone, and when he first propositioned Villari, he left Macchia to one side; any inference that Macchia had some role beyond that of a companion rested on the rather equivocal evidence just discussed and on the repetitive instances of his presence, cf. United States v. Monica, 295 F.2d 400, 402 (2 Cir.1961), cert. denied, 368 U.S. 953, 82 S.Ct. 395, 7 L.Ed.2d 386 (1962), all colored by Garguilo's unusual introduction of Macchia to Villari on their first visit to the print shop."

"If the evidence against Macchia passed the test of sufficiency applicable in a criminal case, it did so, as was said in United States v. Lefkowitz, supra, 284 F.2d at 315, 'only by a hair's bredth'"....

If as indicated above neither ROBINSON nor ALVAREZ violated § 501(c), then ALVAREZ cannot be an aider or abettor or co-conspirator with ROBINSON because they are not charged with an indictable offense.

POINT III

THE GOVERNMENT FAILED AS A MATTER OF LAW TO ESTABLISH A CONSPIRACY AMONG THE DEFENDANTS. ACCORDINGLY, THE INDICTMENT SHOULD HAVE BEEN DISMISSED.

In Jones v. United States, 365 F.2d, 87 Cir. Ct. of App., 10th Cir., the Court stated the following as appropriate for this case (page 88):

"...The essence of the crime of conspiracy, as defined in 18 U.S.C. § 371, is an agreement between two or more parties to commit an offense against the United States, supplemented with overt action by one or more of the conspirators to effectuate the agreement. Braverman v. United States, 317 U.S. 49, 63 S.Ct. 99, 87 L.Ed. 23; United States v. Falcone, 311 U.S. 215, 61 S.Ct. 204, 85 L.Ed. 128; Carter v. United States, 10 Cir., 333 F.2d 354; O'Neal v. United States, 10 Cir., 240 F. 2d 700; Madsen v. United States, 10 Cir., 165 F. 2d 507. A conviction for conspiracy under the federal statute "cannot be sustained unless there is 'proof of an agreement to commit an offense against the United States.' * * *" Ingram v. United States, 360 U.S. 672, 677-678, 79 S.Ct. 1314, 1319, 3 L.Ed.2d 1503, rehearing denied 361 U.S. 856, 80 S.Ct. 42, 4 L.Ed.2d 96. In Jones v. United States, 10 Cir., 251 F2d 288, 290, cert. denied 356 U.S. 919. 78 S.Ct. 703, 2 L.Ed.2d 715, this court stated the law generally applicable to conspiracy cases: ...."

"...'Mere knowledge, approval of or acquiescence in the object and purpose of a conspiracy without agreement to cooperate to accomplish such object or purpose is not enough to constitute one a party to the conspiracy'...."

There is not a scintilla of evidence to show any communication between ALVAREZ and ROBINSON relative to the perpetration of the crime. There is a complete void of evidence that ALVAREZ was aware that ROBINSON was falsifying records or the means he was employing to that end. The Government's case was founded wholly on suspicion and surmise. In Bacon v. U.S., 127 F.2d 985 Cir. Ct. of App., 10th Cir., the Court reversed the conviction on the conspiracy counts with the following comments (page 956):

> "...There can be no conspiracy without an agreement between two or more persons to violate the law. The gist of the offense of conspiracy is an agreement among the conspirators to commit an offense, attended by an overt act of one or more of the conspirators to effect the object of the conspiracy...."
>
> "...The record is devoid of any evidence which tends to show that Bacon had any conversion, agreement, dealings or understanding with Fox regarding an agreement to violate the liquor transportation act...."
>
> "...Mere possibility or suspicion that goods lawful in themselves might be used unlawfully is not enough to make one an aider and abettor. More is required than that. He must know or have reason to know that the goods which he sells are and will be used in an unlawful venture...."

ALVAREZ never furnished the forms nor reviewed the applicant's work record. Aside from his taking money from several of the Government witnesses, his acts of bringing the applicant to ROBINSON for the latter to fill out forms, was consistent with his responsibility as a Master-at-Arms. He is not charged with taking money from any of the seamen seeking Group 1 books. Evidence was wholly lacking to connect ALVAREZ in a common plan and scheme with other defendants. For all we know ALVAREZ may have been acting independently of ROBINSON.

ROBINSON had a right to use the forms because that was his duty. He is charged with conversion and not improper use. It is not clear from the record as to whether ALVAREZ ever picked up any of the forms; but if he did, they were given to ROBINSON whose duty it was to assist the seamen in their preparation. There is no evidence that ALVAREZ ever furnished false information to ROBINSON or anyone else in order to falsify forms. The forms were used for the purpose for which they were intended, i.e., to record the sea time record of each of the Group 1 applicants. The applications were merely informational because the union checked their content, and then issued the union books which were prepared in the record room. Therefore there is no evidence of conversion, or conspiracy to commit conversion.

POINT IV

THE INTERPRETATION MAKING IT A FEDERAL CRIME TO VIOLATE § 501 TO CONVERT BLANK MEMBERSHIP FORM APPLICATIONS HAVING LITTLE OR NO INTRINSIC VALUE IS NOT A REASONABLE INTERPRETATION OF THAT LAW AND ACCORDINGLY VIOLATES ALVAREZ'S CONSTITUTIONAL PROTECTION OF DUE PROCESS OF LAW.

A reading of Chapter 11 of Title 29 and § 501 thereof, clearly indicates that it was intended to have application to substantive matters involving union finances and it so appears to have been Congress's understanding.

In the Court below the attorneys exhaustively researched the question. At one point at a conference between the Court and the attorneys the following colloquy occurred which indicated that this was an unusual case:

"MR. ROSENBAUM: I think this is a case of first impression.

THE COURT: It isn't as clear as crystal to me. I will do some research on this, too, between now and Thursday. My inclination would be to put it to the jury, with the right to you gentlemen to make motions on papers afterwards, if they are convicted and sentenced.

But I want to do a little research on it because I think there is a real problem. I think you have covered it. I think I have got a memo from you.

MR. KINGHAM: I don't believe so. I have a memo I prepared. If your Honor recalls my argument against the Rule 29 motions on conversion. I'd like to hand up the memo at this time and perhaps as an interim measure, and in the interim, I will also research the problem and perhaps give you something additional.

THE COURT: If you will give me it tomorrow, I will be grateful. Serve it on counsel. This is a little different from the usual case of this kind.

MR. KINGHAM: It is indeed, your Honor. And we probably will ha ve to review Mr. Rosenbaum's statement. It is certainly first impression in this district."

Given the state of uncertainty of the trial judge and the Governmental attorney as well as defendants' counsel as to the intention of the law, its interpretation admittedly takes on esoteric proportions.

It is a well recognized principle of law that a statute which either forbids or requires the performance of a certain act in language so vague that men of common experience and intellect must necessarily guess at its meaning, and among them may differ as to its application, violates the first essential of due process of law (International Harvester Co. of America v. Commonwealth of Kentucky, 234 U.S. 216; Collins v. Commonwealth of Kentucky, 234 U.S. 634).

> "...'Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid.' United States v. Brewer, 139 U.S. 278, 288, 11 S.Ct. 538, 541, 85 L.Ed. 190; Nash v. United States, 229 U.S. 373, 33 S.Ct. 780, 57 L.Ed. 1232; International Harvester Co. v. Kentucky, 234 U.S. 216, 34 S.Ct. 853, 58 L.Ed. 1284; McBoyle v. United States, 283 U.S. 25-27, 51 S.Ct. 340, 75 L.Ed. 816; Cline v. Frink Dairy Co., 274 U.S. 445, 459, 47 S.Ct. 681, 685, 71 L.Ed. 1146. In the latter case Chief Justice Taft said 'generally that the decisions of the court upholding statutes as sufficiently certain, rested upon the conclusion that they employed words or phrases having a technical or other special meaning, well enough known to enable those within their reach to *correctly apply them, * * * or a well-settled common-law meaning, notwithstanding an element of degree in the definition as to which estimates might differ, * * * or, as broadly stated by Mr. Chief Justice White in United States v. [L.] Cohen Grocery Co., 255 U.S. 81, 92, 41 S.Ct. 298, 301, 65 L.Ed. 516, 14 A. L. R. 1045, that, for reasons found to result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded.'...."
> (People v. Grogan 267 N.Y. 138, 145)

CONCLUSION

The judgment of conviction of defendant ALVAREZ should be vacated and the indictment dismissed because:

a) The indictment does not state a criminal violation of Title 18 U.S.C. and § 2 and § 371 and 29 U.S.C. § 501(c).

b) No evidence was adduced at the trial to sustain the verdict against the defendant ALVAREZ either as a principal, aider and abettor or as a conspirator.

c) Section 501(c) of 29 U.S.C. is so vague and indefinite as to the facts under which defendant was indicted so that defendant could not reasonably know that his acts would violate this section and according to that extent, § 501(c) is unconstitutional.

Respectfully submitted,

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A 202 Affidavit of Personal Service of Papers H LUTZ APPELLATE PRINTERS INC.

US COURT OF APPEALS: SECOND CIRCUIT

USA,

Appellee,

against

[redacted]
ROBINSON, et al,

Defendants-Appellants.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, James Steele, *being duly sworn,*

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

250 West 146th Street, New York, New York

That on the 6th *day of* January *19* 74 *at* *

deponent served the annexed Brief for ~~Defendants~~ Defendants-Appellant *upon*

*

the *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* Attorney(s) *herein,*

Sworn to before me, this 6th *day of* January *19* 74

James Steele

Print name beneath signature

JAMES STEELE

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418980
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975

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